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In The

Supreme Court of the United States

October Term, 1987

SAM T. COSTON

Cross-Petitioner,

vs.

PLITT THEATRES, INC., a corporation,

Cross-Respondent.

CROSS-PETITION OF SAM T. COSTON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED

1. The Age Discrimination in Employment Act of 1967, as amended, provides that in the event of a willful violation, the amounts owing to the employee shall be doubled. If amounts earned by the employee in mitigation are subtracted from backpay prior to doubling, then the effect is to reduce not only backpay but also liquidated damages. Did Congress intend for amounts earned in mitigation by the employee to be subtracted from his backpay award before, rather than after, the doubling?

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Sam T. Coston Cross-Petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

d.

REFERENCE TO REPORTS

The opinion of the Court of Appeals is reported at 831 F.2d 1321, and was appended to Plitt's Petition as App. A, 1a-33a. The order of the district court granting in part and denying in part Coston's petition for entry of judgment subsequent to jury verdict was appended to Plitt's Petition as App. D, 37a-49a. The order of the district court denying Plitt's post-trial motions was appended to Plitt's Petition as App. E, 50a-57a. Cross-Petitioner Coston incorporates by reference those portions of the Plitt Appendix.

e.

JURISDICTION

This is a Cross-Petition filed pursuant to Supreme Court Rule 19.5. The Plitt Petition for Certiorari was purportedly filed in this Court on January 15, 1988. Coston's attorney received Plitt's Petition on January 19, 1988. This Cross-Petition is being filed within thirty (30) days thereafter.

The judgment of the Court of Appeals was entered on September 23, 1987. Plitt's petition for rehearing was denied October 28, 1987. The jurisdiction of this Court was initially invoked by Plitt under 28 U.S.C. §1254(1) and 28 U.S.C. §2101.

f.

STATUTES INVOLVED

Section 7(b) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. §626(b)), provides, among other things, that:

> "Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §§216, 217): provided that liquidated dam-

ages shall be payable only in cases of willful violations of this Act."

Section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. §216(b) provides, among other things, that:

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

g.

STATEMENT OF THE CASE (GENERALLY)

This is an age discrimination jury case brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 *et. seq.* Plaintiff Sam Coston was employed as a district manager and operations manager by Defendant Plitt Theatres, Inc.

At the close of trial on March 29, 1984, the jury entered a verdict in favor of Coston and made a specific finding that Plitt's violation of the ADEA was willful. The issue of computation of liquidated damages for the willful violation was reserved to the court rather than the jury.

On October 3, 1984, the district judge entered final judgment for Coston. In awarding liquidated damages, the district court computed those damages prior to reducing the backpay award for mitigation. (Pet. App. D at 45a-47a). The court cited with approval the following holding from *EEOC v. United Air Lines, Inc.*, 575 F.Supp. 309 at 311 (N.D. Ill. 1983), rev'd on other grounds, 755 F.2d 94 (7th Cir. 1985):

> "To rule otherwise (and permit the reduction of the backpay award prior to the calculation of the liquidated damages thus necessarily resulting in a reduction of the liquidated damages amount) would unfairly penalize plaintiff who was under a duty to mitigate." (Pet. App. D at 46a).

In Plitt's post-trial motion, it reasserted its objection to the district court's method of computing the liquidated damages. The district court, in denying Plitt's post-trial motion on that issue, stated that "it would be unfair to reduce the punitive damages against the defendant [merely] because the plaintiff observed his duty to mitigate damages." (Pet. App. E at 55a-56a).

The Seventh Circuit reversed on the issue of computation of liquidated damages. (831 F.2d at 1328-1330; Pet. App. A at 11a-15a).

h.

STATEMENT OF THE CASE (FACTS)

Coston's backpay consisted of $59,950.00 in salary, $2,473.30 in nonwage benefits, plus $9,600.00 in unallocated commissions and bonuses (the latter figure having been decided by the jury). (Pet. App. D at 43a). Coston earned $34,603.20 in mitigation (*Id.* at 43a).

Plitt did not dispute these figures. (*Id.* at 43a.)

i.

REASONS FOR GRANTING THE CROSS-PETITION

1. The dispute here is purely one of law and affects each case in which a willful violation of the ADEA is found.

2. The ADEA does not state whether liquidated damages should be computed before or after subtracting mitigation. The ADEA's reference to the FLSA is not helpful in ascertaining Congressional intent, as the issue of mitigation never comes into play in an FLSA case. (Unpaid minimum wages or unpaid overtime under the FLSA are "amounts owing" for hours already worked by the employee. If the employee has already worked those hours, he has no duty to mitigate.).

3. If liquidated damages are computed *prior* to mitigation being subtracted from the backpay award, then the employee loses $1.00 from his award for each $1.00 of mitigation. However, if liquidated damages are computed *after*

subtracting mitigation from the backpay award, then the employee loses $2.00 from his award for each $1.00 of mitigation. Certiorari is warranted here to ascertain whether Congress intended for employees to be deterred from mitigating damages by their knowledge that mitigation will result in a double reduction of amounts awarded in a lawsuit.

4. If Congress intended liquidated damages to be punitive in nature, then certiorari is warranted to ascertain whether Congress intended the novel idea that punitive damages should be affected by mitigation.

5. If Congress intended liquidated damages to compensate for obscure and difficult to prove noneconomic losses, then certiorari is warranted to ascertain whether Congress intended for a noneconomic-based award to be affected by an employee's success at economic mitigation.

6. Congress intended a prevailing employee to recover not only financial losses, but also to obtain a full redress for the effects of discrimination. Congress also intended that an ADEA award serve the purpose of barring like discrimination in the future. Certiorari is warranted to ascertain whether providing the employer a $2.00 windfall for each $1.00 of mitigation earned by the employee serves those Congressional purposes.

j.

ARGUMENT

I.

NEITHER THE ADEA NOR THE FLSA SPECIFICALLY ADDRESSES THE ISSUE OF WHETHER "AMOUNTS OWING" SHOULD BE DOUBLED BEFORE, RATHER THAN AFTER, SUBTRACTING AMOUNTS EARNED IN MITIGATION. CERTIORARI IS THEREFORE NECESSARY TO CLARIFY THIS PURELY LEGAL ISSUE.

The issue presented by Coston here is one that may recur in every ADEA case in which a willful violation is found. The ADEA provides no guidance, other than to refer the courts to the FLSA. But under the FLSA, the employee does not even have a duty to mitigate, as his minimum wage or overtime monetary losses are for hours already worked, and which hours thus cannot be recouped elsewhere. The problem of whether to subtract mitigation before, rather than after, doubling an FLSA award thus never arises, as such mitigation is *never* subtracted.

Nor does the phrase "amounts owing" appearing in the ADEA provide clarification when read in conjunction with the FLSA. That phrase could mean amounts owing to the employee prior to employer setoffs or amounts owing to the employee after employer setoffs. But under the FLSA's "cash-in-hand" policy, the employer may not setoff against backpay (and hence against liquidated damages) sums due it from the employee. *Brennan v. Heard*, 491 F.2d 1 at 4 (5th Cir. 1974).

Employee mitigation is an employer setoff against backpay. But to subtract mitigation prior to computing liquidated damages allows the setoff to affect both backpay and liquidated damages – a result inconsistent with the FLSA.

Although the circuits which have discussed the issue

here (either by holding or by dictum) have reached similar (though not identical) conclusions, their rationales reveal the confusion resulting from Congressional failure to speak clearly:

1. The Seventh Circuit in *Coston* treated the district court's method of calculation here as improperly modifying the method set forth in the FLSA. (831 F.2d at 1328-30; Pet. App. A at 11a-15a.) But as discussed above, the FLSA never injects the issue of mitigation into its calculation of liquidated damages. No FLSA "method" on mitigation exists, and thus none can be altered;

2. The Fourth Circuit in *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985) bases its holding on its erroneous presumption that: "[l]iquidated damages are not punitive in nature but compensatory." *Id.* at 967. *Fariss* thus ignores the holding of *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 at 125 (1985), wherein this Court held that Congress intended for liquidated damages to be punitive in nature. Nor does *Fariss* explain why it specifically cites and follows *Thurston* on the willfulness standard (*Fariss* at 967), while ignoring *Thurston* on the punitive nature of liquidated damages;

3. The Third Circuit in *McDowell v. Avtex*, 740 F.2d 214 (3rd Cir. 1984), vacated and remanded on other grounds 469 U.S. 1202 (1985), was faced with the issue of whether to deduct pension benefits from a backpay award. The court held that "deducting pension benefits received by McDowell from his back pay award could potentially reduce the amount in liquidated damages to which he otherwise could be entitled while benefitting the employer by giving it a windfall – *a result certainly not intended by the ADEA*. This apparent inequitable result of mitigating the back pay occurs because under the ADEA liquidated damages are measured by doubling the back pay award." *Id.* at 218 (emphasis added). The court then went on to discuss the unfairness of an employer "paying two dollars less in total damages for every dollar McDowell received in pension plan benefits . . . ", and that such a

result would deprive the employee of "the full benefit of the liquidated damages provision." *Id.* at 218.

The *McDowell* court thus implicitly acknowledges that something is awry here, in that reducing liquidated damages for mitigation provides "a result certainly not intended by the ADEA." *Id.* at 218.

Courts nationwide are thus apparently computing liquidated damages in a manner which they believe to be provided by statute, yet inconsistent with the intent of that statute. The three circuit cases discussed above provide a good summary as to the confusion which can be eliminated only by statutory amendment or by grant of certiorari.

II.

ONE OF THE PURPOSES OF THE ADEA IS TO ENCOURAGE OLDER INDIVIDUALS TO KEEP WORKING IF THEY SO DESIRE. BUT THE CALCULATION FORMULA APPROVED BY THE SEVENTH CIRCUIT HERE DISCOURAGES CONTINUED WORK AND MITIGATION, AS MITIGATION RESULTS IN A TWO DOLLAR DEDUCTION FROM THE AWARD FOR EVERY DOLLAR EARNED BY THE EMPLOYEE.

One of the central purposes of the ADEA is to encourage older individuals to continue to work if they so desire. See *Blim v. Western Electric Co., Inc.*, 731 F.2d 1473 at 1478 (10th Cir. 1984), cert. den'd 469 U.S. 874 (1984). The focus of the Congressional statement of purpose is on the continuing employment of older workers. *Id.* at 1479.

The calculation formula approved by the Seventh Circuit would, in effect, punish the employee for diligently securing comparable employment, and also provide to the employer a $2.00 windfall for each dollar earned by the employee at his new job. See *McDowell, supra* at 218; *EEOC v. United Air Lines, Inc.*, 575 F.Supp. 309 at 311-312 (N.D. Ill. 1983), rev'd on other grounds 755 F.2d 94 (7th Cir. 1985).

An employee who loses $2.00 for each $1.00 of mitigation has less incentive to seek comparable employment. Congress could not have so intended to deter older employees from staying in the workforce and from mitigating lost wages.

III.

THIS COURT HAS HELD THAT LIQUIDATED DAMAGES ARE PUNITIVE IN NATURE. LIQUIDATED (PUNITIVE) DAMAGES SHOULD THEREFORE REMAIN UNAFFECTED BY MITIGATION.

"The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." *Trans World Airlines v. Thurston*, 469 U.S. 111 at 125 (1985). Under the computation formula adopted by the Seventh Circuit, the employee's mitigation results in a subtraction from the liquidated damages punitive award.

But the premise behind punitive damages is a public policy consideration of punishing the wrongdoer and/or setting an example for similar potential wrongdoers. *Black's Law Dictionary* (5th ed. 1979) at 352. Coston is aware of no legal basis for making punitive damages subject to mitigation. As this Court has already spoken on the punitive nature of liquidated damages, those damages should not be reduced merely because of an employee's success at mitigation.

IV.

EVEN IF LIQUIDATED DAMAGES ARE PARTIALLY TO COMPENSATE FOR OBSCURE AND DIFFICULT TO PROVE NONECONOMIC LOSSES, THE MONETARY VALUE OF THOSE NONECONOMIC LOSSES SHOULD NOT BE DIMINISHED BY AN EMPLOYEE'S SUCCESS AT ECONOMIC MITIGATION.

Even after *Thurston*, the Seventh Circuit hinted that Congress might have intended liquidated damages to provide compensatory relief for losses that are too obscure and difficult to prove. *Coston, supra*, 831 F.2d at 1328-9, n.2; Pet. App. A at 12a-13a, n.2. Under such a theory (which was common prior to *Thurston*), the liquidated damage provision of the ADEA (in contrast to the actual damage "make whole" features) is designed to remedy those damages suffered by the employee unrelated to wages or economic compensation. See *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 at 687 (7th Cir. 1982), cert. den'd 459 U.S. 1039 (1982).

But even if liquidated damages were not punitive, and were instead intended to compensate for noneconomic losses, there is no reason for noneconomic compensation to be affected by economic mitigation. Such a "double deduction" would discount the noneconomic damages suffered by an older employee who is illegally fired and who has thus suffered the insult, insecurity and uncertainty of wondering whether he will again be able to find comparable employment at a late age.

V.

THE SEVENTH CIRCUIT'S HOLDING IS INCONSISTENT WITH THE CONGRESSIONAL PURPOSES OF FULLY REDRESSING THE EFFECTS OF DISCRIMINATION AND BARRING LIKE DISCRIMINATION IN THE FUTURE.

As the effects of age discrimination are not solely economic, a prevailing employee is entitled not only to recovery of his financial losses, but also to a "full redress for the effects of discrimination." See *Ford Motor Co. v. EEOC*, 458 U.S. 219 at 232, 234-5 (1982). The Congressional purpose of anti-discrimination statutes includes the goal of barring "like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405 at 418 (1975).

Under the holding of the Seventh Circuit here, the employee who is successful at mitigating economic damages obtains diminished compensation for noneconomic effects of discrimination, with the guilty employer thus benefitting rather than being deterred from like discrimination in the future. Even though the employee would be made whole as to backpay, "he would not get the full benefit of the liquidated damages provision," *McDowell, supra* at 218, and thus would not receive a "full redress for the effects of discrimination." The Seventh Circuit's holding is also inconsistent with the goal of barring like discrimination in the future, as it allows Plitt and other employers to infer that their discriminatory acts have consequences only if the employee fails to secure comparable mitigating employment. Certiorari is therefore appropriate to review the divergence between judicial statements of Congressional intent and judicial applications of the liquidated damage provision of the ADEA, which applications appear inconsistent with that intent.

k.

CONCLUSION

For the reasons set forth above, Cross-Petitioner Coston requests that this Cross-Petition for Writ of Certiorari be granted.

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